

DOCKET FILE COPY ORIGINAL

LAW OFFICES
HALEY, BADER & POTTS

4350 NORTH FAIRFAX DR., SUITE 900

ARLINGTON, VIRGINIA 22203-1633

TELEPHONE (703) 841-0606

FAX (703) 841-2345

POST OFFICE BOX 19006

WASHINGTON, D.C. 20036-9006

TELEPHONE

(202) 331-0606

JOHN M. PELKEY
ADMITTED IN D.C. AND VA

RECEIVED

MAY - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 7, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Our File No.
0090

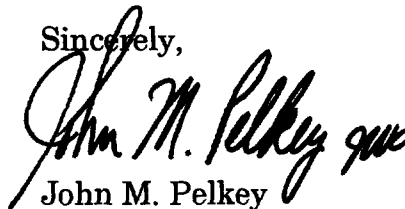
Re: MM Docket No. 93-48
In the Matter of Policies and Rules Concerning
Children's Television Program

Dear Ms. Searcy:

Transmitted herewith on behalf of Haley, Bader & Potts, are an original and nine copies of its Comments in the above-captioned proceeding.

If there are any questions concerning this matter, please contact the undersigned directly.

Sincerely,


John M. Pelkey

JMP:lgs

Enclosures (10)

7257

Before The
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

MAY - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)
Policies and Rules Concerning)
Children's Television Programming)
Revision of Programming Policies)
for Television Broadcast Stations)

MM Docket No. 93-48

TO: The Commission

COMMENTS OF HALEY, BADER & POTTS

Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, VA 22203-1633
(703) 841-0606
(703) 841-2345 (Fax)

May 7, 1993

TABLE OF CONTENTS

	<u>Page</u>
Summary	2
I. The Need for Perspective	4
II. The Commission Must Let Broadcasters Use Their Discretion to Determine How Best to Fulfill Their CTA Obligations	9
A. The Commission's Suggestions	9
B. The Commission has Failed to Recognize that the Constitution Imposes Upon It an Obligation to Ensure that the Policies and Rules Adopted by It Are "Narrowly Tailored"	10
1. The Commission Should Not Circumscribe the Use of Short Segment Programming.	11
2. The Commission Should Not Classify Programming According to its Primary Objective: How do you Distinguish "Wonderworks" from "Wonder Years?"	15
3. Because Processing Guidelines Would Have the Effect of Mandating the Programming to be Aired, No Such Guidelines Should be Adopted	21
Conclusion	22

Before The
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

MAY - 7 1993

In The Matter Of)
)
Policies and Rules Concerning)
Children's Television Programming)
)
Revision of Programming Policies)
for Television Broadcast Stations)

MM Docket No. 93-218
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF HALEY, BADER & POTTS

Haley, Bader & Potts ("HB&P")¹, pursuant to the procedures established in Section 1.415 of the Commission's rules, hereby provides its Comments with respect to the Notice of Inquiry ("NOI")² issued by the Commission in the above-captioned proceeding.

¹ Haley, Bader & Potts is a Washington-area law firm that has been representing clients before the Federal Communications Commission since the Commission's inception. Its television clients include both commercial and noncommercial television broadcasters who are required to comply with the rules and policies adopted by the Commission in response to the Children's Television Act of 1990. The firm's client base includes clients who have been airing television programming for more than 40 years and who have been attempting throughout that time to provide the children in their viewing areas with programming that serves their educational and informational need.

As one of the services provided to its clients, the firm helps to prepare and review the listing of children's television programming required to be placed in each television station's public inspection file and required to be submitted with the station's renewal application.

Summary

The goal of the NOI is the adoption of policies that would provide further guidance to licensees concerning their obligations under the Children's Television Act of 1990³ ("CTA"). The Commission deems there to be a need for such further guidance based upon its review of certain renewal applications filed since February 1992. Although not mentioned by the Commission, a driving force behind the NOI appears to be the continuing Congressional oversight of the CTA, culminating in hearings held on March 10, 1993 before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce of the U.S. House of Representatives.

While the Commission must remain sensitive to the Congressional reaction to the Commission's implementation of the CTA, the Commission must remain equally sensitive to the fact that the CTA was an attempt to create a compromise that would achieve a greater amount of educational and informational programming for children while at the same time recognizing that governmental intrusion into programming decisions must be narrowly crafted if it is to have any hope of being constitutional. Overreaction to Congressional concerns would almost assuredly result in Governmental intrusion that is not "narrowly tailored" and that consequently would be unconstitutional. Caution is especially counseled in the present case given the very limited amount of time that the regulations and policies adopted by the Commission in response to the CTA have been in effect. The upcoming Fall 1993 season will mark the first full-year season that programming prepared in response to the CTA will be aired and it would be precipitous for the Commission to adopt new policies and regulations prescribing

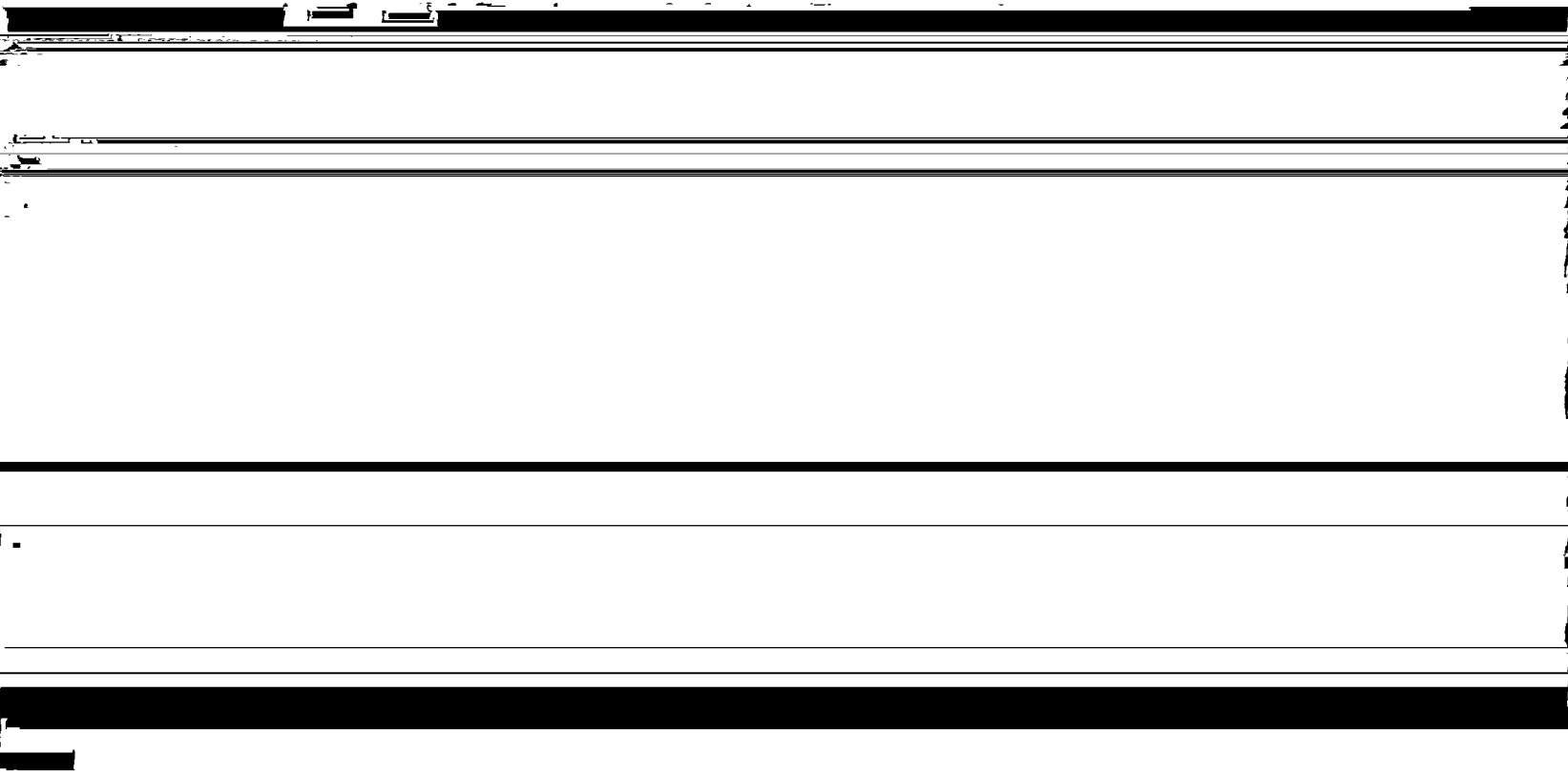
³ Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sections 303a, 303b, 394.

the type of programming that broadcasters must air without having even seen the programming that will be aired in direct response to the CTA.

As regards the specific suggestions made by the Commission in the NOI, HB&P proposes as follows: First, the Commission should not further limit broadcasters' use of vignettes and short segment programming. The Commission itself noted in its 1991 *Report and Order*⁴ that such programming can be particularly useful in serving the educational and informational needs of children. Not only does this continue to be the case, but such programming can be inserted into schedules at a time when the maximum number of children are watching – thus increasing the likelihood that the educational and informational programming that the Congress and the Commission are trying to foster will

I. The Need for Perspective

Even though the Commission acknowledges in the NOI that its analysis of station compliance with the mandates of the Children's Television Act of 1990 must be based on only one year's worth of renewals, it does not appear to recognize the implications of that fact. At the time that the first set of post-CTA renewal applications were filed, the rules implementing the CTA had been in effect for less than six months and the *Report and Order* adopting those rules was only ten months old. Complicating the situation was the fact that the *Report and Order* was not released until the middle of April and the *Memorandum Opinion and Order* granting reconsideration was not issued until the end of August. Normally, television stations enter into programming contracts of at least one year's duration and multi-year contracts are commonly required to ensure the



new commercial limitations opened up some limited additional time for the airing of short segment programming. Thus, simply because of the unfortunate timing of the *Report and Order* and the *Memorandum Opinion and Order* on reconsideration, coming as they did so far into the planning for the 1991 - 1992 season, it was not realistic to expect to see a significant increase in the airing of already-produced educational and informational program length material until the 1992 - 1993 season.

As difficult as was the task of integrating into schedules the limited amount of already-produced program-length children's educational and informational programming available to commercial broadcasters, even more difficult was the task of producing and broadcasting new program-length children's educational and informational programming. Two problems in the production of such programming are paramount: money and time.

Money: A successful children's television program is phenomenally expensive to produce. For example, a program to be known as "The Puzzle Factory" is being produced by KCET, Los Angeles, and Lancit Media.⁶ It is expected that the program, which is aimed at pre-schoolers and which will deal with cultural diversity and ethnic prejudice, will air in 1994.⁷ Full funding of the program will require an expenditure of \$13 million.⁸ Thirteen Million Dollars is more money than most commercial television stations in the United States net. While not all children's television shows require that kind of expenditure of resources, the point remains that the development of a new, quality children's educational/informational show is far beyond the capabilities of many individual stations. By

⁶ Current, April 12, 1993 at 4.

⁷ CPB Report, April 12, 1993 at 1.

⁸ Current, April 12, 1993 at 4.

virtue of economic necessity, an individual station usually must rely upon the network (if it is a network affiliate) and independent producers.⁹ The development of new programming by either the networks or independent producers takes time.¹⁰

Time: At the oversight hearings held on March 10, 1993, much was made of the fact that PBS was able to produce "Lamb Chop's Play-Along" in nine months. Lost sight of was the fact that, even if it had begun production of a new program on the day that the *Memorandum Opinion and Order* reconsidering the April 12 Report and Order was released, a commercial broadcaster adhering to the 9-month timetable would not have aired the new program until the Fall 1992 season – with the result that the new program would not have shown up in most of the

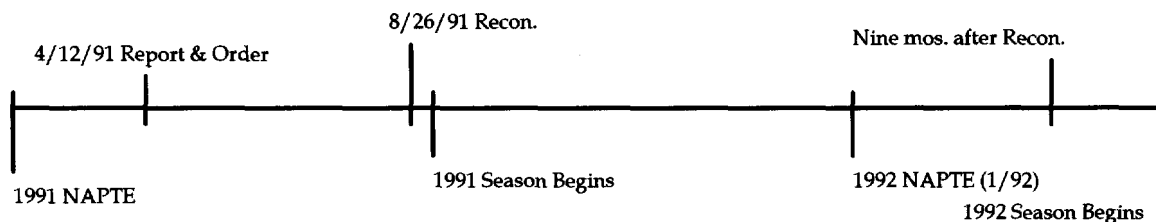
⁹ Some stations have been able to produce programming on their own. In its written testimony in the oversight hearings, the National Association of Broadcasters explained that last year 70 stations entered nearly 200 programs in its "Service to Children" television awards competition. These programs dealt with a wide variety of issues of importance to children of all ages. The difficulty with such productions, however, is that they usually are produced by a single station for a single station. As a result, their airing barely produces a cognizable blip in any statistical analysis of the children's programming aired by broadcasters. It is only when the networks and the producers disseminate programming on a nationwide basis that the increase in new children's programming becomes noticeable.

¹⁰ In order to achieve instant compliance with the Commission's directives, a station could throw together a low-budget, locally-produced children's program that would be "educational" or "instructive." After all, it costs very little to broadcast a program that consists of nothing more than a teacher, stationed before a blackboard, explaining the letters of the alphabet. What would

renewal applications reviewed by the Commission.¹¹

More fundamentally, the concern expressed by the Commission with the amount of time that it is taking for commercial broadcasters to come up with new children's educational and informational programming simply underestimates the logistical problems that must be confronted in producing such programming. A concept for the new program must be devised.¹² Scripts must be written. A cast must be chosen. The program must be taped. It is simply unrealistic to assume that the wholesale changes in Children's programming that the Commission apparently expects can occur in a matter of months.¹³ Normal lag times involved in the production of programming dictate otherwise.

¹¹ The timetable confronted by broadcasters can be depicted as follows:



As can be seen, if production of a new program had commenced immediately upon the issuance of the *Memorandum Opinion and Order* on reconsideration, that program, even if it could comply with a nine-month schedule, would not have been ready until shortly before the commencement of the 1992 season, and long after the 1992 NAPTE convention at which many of the key programming decisions for the 1992 season had already been made.

¹² The importance of coming up with a viable concept cannot be overstated. A key to the success of a children's program is the program's staying power. If the program will not be able to make it through several seasons, much time, energy and money will have been needlessly lost. From the producer's perspective, the inability of the program to make it through several seasons will mean that the program will not be able to be syndicated. Because little viewer program loyalty can develop, no profits can be garnered from spin-offs and the much-touted "Barney" effect that was a recurrent theme at the oversight hearings (that is, good educational programming will lead to profitable spin-offs that will make the production of such programming financially rewarding) will not occur. The result will be a financial failure that will create disincentives for the production of educational/instructional programming for children. From the viewer's perspective, little show loyalty can develop, with the result that no clear educational message will be received.

This is not to say that broadcasters have been standing still. Quite a few new programs have taken to the airwaves since the passage of the CTA. With the passage of time, however, the number of new educational and informational programs that are targeted to children will increase. In fact, this trend is demonstrated in the recent announcements regarding the networks' children's programming schedules. ABC will be airing a new show, "Cro," that is an attempt to teach children science fundamentals in an animation format.¹⁴ The show's producer is Children's Television Workshop, producer of "Sesame Street."¹⁵ ABC will also continue its production of special news programs for children. CBS is bringing "Beakman's World" to network television.¹⁶ Beakman's World is another show that attempts to teach science to children, albeit in a somewhat off-beat manner.¹⁷ Fox will be providing its affiliates with an animated "Where in the World is Carmen Sandiego?", which, like the computer game of the same name, will seek to teach geography.¹⁸ NBC will continue to air "Saved by the Bell," a program that has been recognized by both the Congress and the Commission as being educational and informational.^{19 20}

was materially aided by the fact that the program is essentially a repackaging of a program that has been around in one guise or another for many years.

¹⁴ Jon Lafayette, *New Saturday a.m. slates full of 'kiducational' fare*, Electronic Media, April 19, 1993, at 3, 45.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Report and Order*, 6 FCC Rcd. at 2115.

II. The Commission Must Let Broadcasters Use their Discretion to Determine How Best to Fulfill their CTA Obligations

In short, while the educational and informational programming that the Congress and the Commission expected has been slower in coming than either apparently anticipated, programming that should meet the expectations of Congress and the Commission has been aired and is being produced – and more is coming. The Commission fails to recognize in its NOI that its disappointment is premised upon a necessarily limited sample of those programming efforts that could be put in place in the short period of time between the adoption of the new rules and the filing of renewal applications. As a result, there is an air of desperation to the NOI that is quite unjustified. If the Commission yields to this sense of panic to which it is currently subject, it stands the real risk of undermining the very framework of its earlier Children's television decisions – with the result that the NOI, contrary to its stated goal, will lead to additional confusion and not to the clarification that the Commission seeks.

A. The Commission's Suggestions

In essence, the NOI seeks comment as to whether the Commission should overturn the *Report and Order* in three key respects. First, the NOI suggests that vignettes and other short-segment programming should play a smaller role in a broadcaster's children's programming efforts than that envisioned by the Commission in the *Report and Order*. Second, the Commission proposes that only programming that has as its "primary objective" education, rather than entertainment, can qualify as the type of "core" children's programming that would enable a broadcaster to demonstrate that its programming comports with the CTA's requirements. Third, the NOI proposes to adopt processing guidelines that would allow the staff to determine whether the programming on which a

licensee is relying to support its renewal is of a type (i.e., is sufficiently "correct") and quantity to permit a grant of the licensee's renewal at the staff level.

B. The Commission has Failed to Recognize that the Constitution Imposes upon It an Obligation to Ensure that the Policies and Rules Adopted by It Are "Narrowly Tailored"

Unfortunately missing from the NOI is any discussion of the First Amendment considerations that are at play²¹. This omission is telling. Whereas Congress, in adopting the CTA, recognized the constitutional implications of its action in passing the CTA, the Commission has not even acknowledged that its proposals have constitutional overtones.

As was noted in the *House Report*, broadcasters do not lose their First Amendment freedoms solely by virtue of the fact that they are broadcasters.²²

While broadcaster's rights are somewhat circumscribed ²³ those rights cannot be



Recognizing this, Congress sought to avoid constitutional problems by allegedly narrowly tailoring the CTA in two respects. First, it specifically provided that the legislation was not to "exclude any programming that does in fact serve the educational and informational needs of children."²⁵ Second, it explicitly provided that the broadcaster was to be granted "discretion to meet its public service obligation in the way it deems best suited."²⁶

Without the CTA's requirements being so tailored, the legislation would be unconstitutional. The Commission appears to have lost sight of this fact, however. As a result, the Commission is proposing fundamental changes to its Children's television regulations that would have the effect, in many cases, of substituting the Commission's judgment for the broadcaster's. Rather than being narrowly tailored, the new regulations would establish the FCC as the new Program Director for all of the nation's television stations. Not only would the Commission become a Program Director, it would also become the government censor -

informational programming to children:

short segment programming, including vignettes and PSA's, may qualify as specifically designed educational and informational programming for children. . . . Whether or not short segment programming fully satisfies the requirement to air programming

also recognized that short vignettes can often be locally produced with acceptable production quality. These observations remain as true today as they were three years ago. As a result, the Commission's new-found dislike of short segment programming is nothing short of mystifying.

Beyond the fact that the Commission's change of heart is inexplicable, there is yet another reason for permitting broadcasters to place heavy reliance on short segment programming to meet their CTA obligations: short-segment programming can be more effective than full-length programming in reaching a larger number of children with educational and informational programming. For all their critical acclaim, many full-length educational programs do not attract many viewers. This is especially true with respect to older children, i.e., those who are ten to 16 years old. While younger children can often be directed to educational or informational programming by solicitous parents, older children frequently are less receptive to such direction. Children of that age watch what they want to watch. If a child finds a program to be too boring, she will simply switch the channel. "Talking head" formats are broadcast anesthetics that are tuned out almost immediately. That is why the successful children's programming dresses up the educational/instructional content by using fictional, cartoon-like characters such as Big Bird or Barney, game show formats, such as in "Where in the World is Carmen Sandiego?" or outright bizarreness, such as in Beakman's World. Even the children's shows that succeed in sugar-coating the educational/informational content, however, suffer from relatively poor viewership ratings. Many cannot come close to the ratings achieved by the shows that are purely entertainment.²⁹ The way to reach those children who are

²⁹ Reaching the older child audience with educational/informational programming has been a particular problem. CPB reports that "Where in the World is Carmen Sandiego?" had an average rating of "1.0" for the 1991 - 1992 season, the last period for which average ratings are

watching the “entertainment” shows but not the educational shows is precisely through the use of those short segment programs that the Commission now appears to find at odds with the objectives of the CTA.

The Commission should carefully rethink its position on the use of short segment programs. The objective of the CTA was to provide education and informational programming to as many children as possible – not to require broadcasters to air full length programs simply as a type of broadcaster obeisance to the public trustee concept. In short, the Commission’s suggestion that broadcasters, in meeting their CTA obligations, not be permitted to place substantial reliance on short segment programming is not only contrary to the Congressional intention to give broadcasters great discretion in deciding how to meet their CTA obligations, but is also contrary to the objectives of the Act. Rather than chiding broadcasters for using short segment programs, the Commission should reaffirm the principles stated in the *Report and Order* wherein the Commission recognized the utility of short segment programming and acknowledged the possibility of a broadcaster being able to rely exclusively on such programming to meet its CTA obligations. In any event, the Commission must make it clear that a broadcaster can rely upon such programming to meet those obligations³⁰. Even if unintended, the suggestion contained in the NOI that reliance on short segment programming is contrary to the CTA’s objectives will, as a practical matter, create a de facto standard³¹, likely to be used at the time of

publicly available for the show. This pales in comparison to the ratings achieved by entertainment fare with even mediocre ratings.

³⁰ Congress itself recognized that no programming should be excluded in deciding whether a broadcaster has met its obligations under the Act. *See House Report* at 12.

³¹ The Commission quite correctly acknowledges in the NOI that processing standards have an unfortunate tendency to take on the force of law. If the Commission were to downplay the importance of short segment programming, the temptation would be to give such programming

renewal against broadcasters who, in good faith, are seeking to comply with the CTA.

2. The Commission should not Classify Programming
According to its Primary Objective: How do you
Distinguish "Wonderworks" from "Wonder Years"?

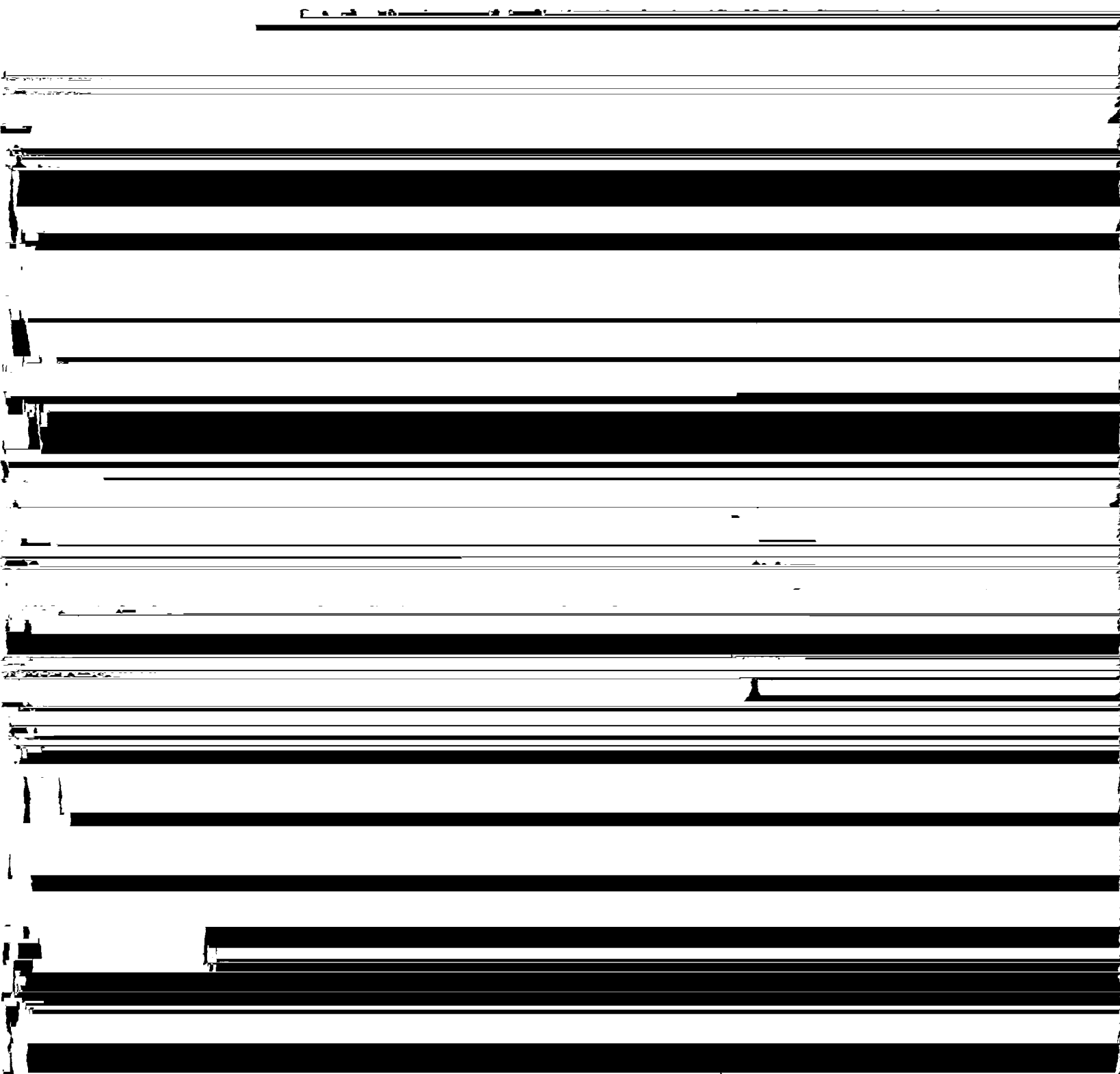
In an attempt to provide some guidance to broadcasters, the Commission proposes to specify that a program will be deemed to comply with the CTA's objectives if its primary objective is to educate or inform, whereas, if the primary objective of the program is to entertain, the program will not be applied towards the broadcaster's "core" children's programming. While the Commission's purpose in proposing such a distinction is understandable, it is so totally unworkable that it would inevitably put the Commission in the position of censor - deciding which programming contains the "correct" amount of educational/informational content and thus can be counted as "core" programming and which programming is too entertainment-oriented and thus cannot be counted towards the broadcaster's "core" requirement.³²

Indeed, the very programs cited by the Commission as examples of the types of programs that can and cannot be counted by broadcasters toward

short-shrift and to focus instead on regular length programming, regardless of how abysmal and unwatched that programming might be.

³² The Commission apparently senses the need to categorize programming based upon its review of renewal applications filed since the CTA became effective. The Commission notes with concern the fact that some renewal applications listed, as part of the applicants' children's programming efforts, certain programs, particularly "The Flintstones" and "The Jetsons", that the Commission considers to be obviously entertainment and not educational or instructional in nature. Two points should be noted. First, the Commission itself acknowledges that the majority of the renewal applications demonstrated adequate efforts to meet children's programming needs. Thus, it would appear that the Commission is proposing the drastic step of dividing programming into "correct" and "objectionable" categories based upon the activities of a minority of

their "core"³³ programming requirements in fact exemplify the folly of any attempt to classify programming as being primarily educational or primarily entertainment. The NOI suggests that "Winnie the Pooh" is acceptable children's programming upon which a broadcaster can rely to demonstrate that it has met its CTA obligations whereas "G.I. Joe" is not acceptable programming.



What about programming that is intended to be educational, but which becomes so bound up in the entertainment aspects of the presentation that the educational content becomes minimal? Under the Commission's guideline, the program would still qualify because the explicit purpose of the program would be to educate even though the program does an abysmal job of implementing that purpose.

What about programming that was never intended to be educational or informational but, because it was written by writers with a sensitivity toward children's needs, has many of the same attributes as programming that was so intended? The Commission's guidelines would apparently result in such programming being placed on the "inappropriate" list, with the result that programs such as "The Smurfs" and "Winnie-the-Pooh", which Congress has found to be precisely the type of programming that it wishes to encourage broadcasters to air, would no longer be considered appropriate for inclusion in a broadcaster's core of children's programs.

What about works of fiction generally? In the *Report and Order*, the Commission was asked to find that works of fiction could not be counted as demonstrating a broadcaster's compliance with the CTA. The Commission, confronted with the distinct possibility of being forced to conclude that "Sesame Street" was not appropriate children's programming, demurred.³⁴ If works of fiction are to be counted toward a broadcaster's compliance (and they should be), the Commission cannot stand on the sidelines and make fundamental determinations as to whether a work of fiction treats an issue with sufficient taste or decorum or whether the primary purpose of the show was to treat the issue in some socially-acceptable way. If a "G.I. Joe" episode deals with an issue that is

³⁴ *Report and Order*, 6 FCC Rcd at 2114.

important to the social development of children, the program must be counted as one indication of a broadcaster's compliance with the CTA even if "G.I. Joe" is more violent than "Winnie-the-Pooh" and even if the message could have been developed in some other fashion.

The PBS program "Wonderworks" is a well-respected source of dramatic children's fiction. It does an admirable job of airing works of fiction that deal with the problems of growing up.³⁵ "Wonder Years" is also a work of fiction. It also deals with the problems of growing up. Does the slightly "pulpy" texture of "Wonder Years" mean that it is not to be treated seriously and that stations are not to be credited for carrying the program, whereas they are to be credited for airing "Wonderworks"? To ask the question is to answer it for the plain fact of the matter is that no governmental body has the authority under the Constitution to make determinations of this nature.

Plainly, any touchstone based upon intent is unworkable. Similarly misguided would be any effort to make distinctions in programming based upon the percentage of educational/informational material included in a program.

Nonetheless, children's educational/informational programs will contain a high

passing the CTA would be undermined. Similarly, Sesame Street's length could be halved if Ernie did not sing about "Boogie-Woogie Sheep" and if Oscar did not espouse the merits of garbage. If these and similar aspects of the program were dropped in favor of a less "entertaining" format, however, it would only be a matter of minutes before the show were turned off and the Nintendo turned on.³⁶

Any refusal by the Commission to credit broadcasters for airing programming that was not created with primarily an educational objective would also be contrary to Congressional intent. The *House Report* clearly recognized that, to help ensure that the Act could meet the "narrowly tailored" test, no programming that in fact served the educational and informational needs of children would be excluded. *House Report* at 12.

How can the Commission decide whether a broadcaster is meeting its obligations under the CTA? The Commission must follow the intent of Congress. The House and Senate Reports³⁷ clearly established that the Commission was to let each broadcaster make its own determination as to the way in which it could best meet its obligations. This does not mean that the Commission is powerless in the face of a broadcaster that is treating its obligations as a farce. If the Commission believes from its review of a broadcaster's children's programming

³⁶ The anomalous results to which the use of "educational/entertainment" ratio can lead is exemplified by a recent statement made on the floor of the U.S. Senate. In extolling the virtues of "Captain Kangaroo," Senator Simon from Illinois stated: "Captain Kangaroo. . . has entertained and educated our Nation's children for over 30 years." 139 Cong. Rec. S2851 (daily ed. March 11, 1993). Senator Simon chose to describe it as "entertaining" before he described it as "educating" which would lead the rational reader to believe that it is more entertaining than it is educational. Does this mean that "Captain Kangaroo" does not qualify as educational/informational children's programming? Must it now be stricken from the "approved" list because there has been a Congressional finding that the show is too entertaining? Similarly absurd results undoubtedly will occur if the Commission chooses to establish such patently arbitrary pigeonholes as is suggested in the NOI.

³⁷ Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. (1989).

material that the broadcaster is not serving children's educational or informational needs, it should require the broadcaster to justify its efforts. That is the procedure routinely used by the Commission in the case of a perceived violation of the rules. If, for example, the Commission has information that a licensee has conducted a contest in violation of Section 73.1216 of the Commission's rules, the Commission automatically sends out a letter asking the licensee to provide full details relating to the contest in question. There is no reason why the same procedure cannot be used to ensure compliance with the CTA.

For example, if the Commission is concerned that a station's claim that the airing of "The Flintstones" or "The Jetsons" demonstrates compliance with the CTA, the Commission could ask the station to justify its CTA compliance efforts. While intuitively it would appear difficult to claim that the airing of "The Flintstones" or "The Jetsons" demonstrates CTA compliance, it would be a mistake for the Commission automatically to assume that the airing of those shows demonstrates a failure to comply with the CTA. First, it is unclear from the NOI whether the stations who have listed those programs in their children's programming lists are relying solely upon the airing of those programs as evidence of CTA compliance. Just because a station has included in its children's programming list programs that are not usually considered to be educational or informational does not mean that the station is relying exclusively or even primarily upon such programming to meet its CTA obligations.³⁸ The station that is including "The Flintstones," "The Jetsons" or other suspect programming could also be programming "Winnie-the-Pooh" or other programs on the approved

³⁸ Because the groundrules for the use of the Children's programming lists are unclear and untested, many broadcasters, out of an abundance of caution, list all children's programming with educational or informational content.

list. Second, the Letter of Inquiry would provide the station the opportunity to explain whether the episodes of “The Flintstones” or “The Jetsons” upon which it is relying are truly educational or informational. Just because a children’s series is not renowned for its educational content does not mean that all episodes of that series are without educational value. The station would be free, in response to the letter of inquiry, to provide justification, perhaps supported with expert testimony, explaining why the episode in question qualifies as educational/informational children’s programming.

3. **Because Processing Guidelines would have the Effect of Mandating the Programming to be Aired, No Such Guidelines Should Be Adopted.**

As a final point, the Commission suggests the use of staff processing guidelines specifying the amount and type of programming that would permit staff grant of a renewal application. The difficulty with this approach, as the Commission itself recognizes in the NOI, is that such guidelines have a tendency to take on the force of rule. If this were to happen with respect to licensees' CTA obligations, stations would, as a practical matter, be forced to relinquish any discretion as to the programming that they might air to meet their CTA obligations and would be required to air programming that has been found to be

[illegible]

Conclusion

The Commission should refrain from adopting the three policy changes proposed by it in the Notice of Inquiry. Any Commission action at this time is premature. In addition, each of the policy changes would act to deprive broadcasters of the discretion that is a constitutionally-prescribed element of the CTA, and, in so doing, would be contrary to the explicitly-articulated

~~Commission's intent. Accordingly, this proceeding should be terminated.~~